Al-Charles, Inc. d/b/a Harbor Crossing Skilled Nursing Care Facility *and* New England Health Care Employees Union, District 1199, SEIU, AFL–CIO. Cases 39–CA–3308, 39–CA–3309, 39–CA–3375, and 39–CA–3376

August 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon charges filed by the Union in Case 39–CA–3308 on December 18, 1986, and in Case 39–CA–3309 on December 23, 1986, as amended on January 13, 1987, and in Case 39–CA–3375 on February 23, 1987, as amended on March 13, 1987, and April 20, 1987, and in Case 39–CA–3376 on February 23, 1987, as amended March 13, 1987, and April 20, 1987, the General Counsel of the National Labor Relations Board on April 22, 1987, issued an order further consolidating cases, amending consolidated complaint and notice of hearing alleging, inter alia, that the Respondent had engaged in certain conduct in violation of Section 8(a)(1), (3), and (5) of the Act.

On August 4, 1987, the General Counsel approved the parties' settlement agreement involving the charges cited above.

However, due to the Respondent's failure to abide by the agreement, the General Counsel, on November 18, 1991, issued an order consolidating cases, consolidated amended complaint, order revoking settlement agreement, compliance specification, and notice of hearing alleging, inter alia, that the Respondent had engaged in certain conduct in violation of Section 8(a)(1), (3), and (5) of the Act. Although properly served copies of the charges, amended charges, consolidated amended complaint, and compliance specification, the Respondent has failed to file an adequate answer.

On March 24, 1992, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On March 26, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides that within 21 days of the service of a compliance specification, a respondent must file with the General Counsel an answer to the specification. The Respondent was advised in the consolidated amended complaint and compliance specification that unless an answer to the consolidated amended complaint and compliance specification that denied the allegations in the compliance specification in the manner required under the Board's Rules and Regulations was received within 21 days of service, all those allegations would "be deemed to be admitted to be true and Respondent shall be precluded from introducing any evidence controverting them." The undisputed allegations in the Motion for Summary Judgment further disclose that counsel for the General Counsel, by certified mail dated February 5, 1992, notified the Respondent that unless an answer to the consolidated amended complaint and compliance specification complying with the Board's Rules 102.20 and 102.54 was received by the close of business February 14, 1992, a Motion for Summary Judgment would be filed with the Board. On February 12, 1992, the Board's Regional Office received a letter from S. Lowell Barnes, the president of the Respondent.[1] The letter stated, inter alia, that Barnes acquired the Respondent on May 25, 1987, and had "no direct knowledge of any of the complaints and alleged misactions by the corporation prior to May 25, 1987."[2]

In the memorandum in support of the Motion for Summary Judgment the General Cousel contends that the Respondent's February 12, 1992 letter does not constitute a proper answer under Section 102.20 or 102.54 of the Board's Rules and Regulations. In this regard, the General Counsel states that the letter fails as a proper answer because it does not specifically admit, deny, or explain each of the facts alleged in the consolidated amended complaint and compliance specification. Moreover, the General Counsel argues that the Respondent's letter does not place in issue any substantial or material issues of fact which warrant a hearing and therefore would warrant denial of the Motion for

[1] On November 18, 1991, the amended consolidated complaint and compliance specification were served by certified mail on the Respondent at its business address in Old Saybrook, Connecticut. On December 13, 1991, these documents were returned to the Regional Office of the Board by the U.S. Postal Service as unclaimed. On January 8, 1992, the documents were served by certified mail on the Respondent at the address of its current president, S. Lowell Barnes, in Milford, Connecticut.

[2] In his letter, Barnes further asserts, inter alia, that he has no assets with which to satisfy any kind of personal judgment. However, the amended complaint in this case does not allege any personal liability. In the absence of any allegation of personal liability, we find it inappropriate to pass on whether Barnes is personally liable. To the extent that the Respondent has raised economic circumstances as an affirmative defense to its liability, the Board has long held that such circumstances are not cognizable as a defense to liability imposed by a Board Order. See *W. E. Tousley & Sons*, 272 NLRB 636 (1984).

Summary Judgment. We agree with the General Counsel's contentions.

In the absence of good cause shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment insofar as the consolidated amended complaint alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(3) and (1) of the Act. Additionally, as the Respondent has failed to answer the compliance specification adequately or explain the failure under Section 102.54(b) and (c) of the Board's Rules and Regulations, we deem all allegations of the compliance specification to be admitted as true and will order the net backpay as stated in the compliance specification to be paid by the Respondent to the discriminatees.

The complaint further alleges that the Respondent's unfair labor practices are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and that the employees' sentiments regarding representation having been expressed through authorization cards, would, on balance, be better protected by issuance of a bargaining order than by traditional remedies alone. In determining whether a bargaining order is appropriate to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's unfair labor practices. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In weighing a violation's pervasiveness, relevant considerations include "the number of employees directly affected by the violation, the size of the unit, the extent of the dissemination among the work force and the identity of the perpetrator of the unfair labor practices." *Michigan Expediting Service*, 282 NLRB 210, 211 (1986).

The consolidated amended complaint in this case alleges that the Respondent has violated Section 8(a)(1) and Section 8(a) (3) of the Act. The consolidated amended complaint further alleges, in conclusionary terms, that such unfair labor practices preclude the holding of a fair election and that therefore a bargaining order is warranted. Although the unfair labor practices here are serious in nature, the consolidated amended complaint does not allege facts sufficient to enable the Board to evaluate the pervasiveness of the violations. For example, the consolidated amended complaint does not allege the size of the unit or the extent of dissemination, if any, of the violations among the employees not directly affected by them. Accordingly, we deny the General Counsel's Motion for Summary Judgment insofar as it alleges that a bargaining order is appropriate and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act.[3] We shall remand the case for a hearing before an administrative law judge on the issue of whether a bargaining order is an appropriate remedy under the circumstances of this case.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Connecticut corporation, with an office and place of business located at Old Saybrook, Connecticut, has been engaged as a health care institution in the operation of a nursing home providing inpatient medical and professional care services for geriatric patients. During the 12-month period ending January 31, 1987, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $100,000 and purchased and received at its Old Saybrook facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. Further, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About December 11, 1986, the Respondent, acting through then owner Albert Lizzi, at its Old Saybrook facility: (1) promised employees a wage increase and improved working conditions if they rejected the Union as their collective-bargaining representative; (2) informed employees that it was futile for them to seek union representation; (3) created an impression among its employees that their union activities were under surveillance; (4) threatened employees with replacement discharge, plant closure, and unspecified reprisals if they selected the Union as their bargaining representative; (5) solicited employees to inform the Respondent of their union activities, membership, and sympathies; and (6) interrogated employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

About December 11, 1986, the Respondent, acting through its supervisor and agent, Assistant Administrator Marilyn Raudat, at its Old Saybrook

[3] See *Control & Electrical System Specialists*, 299 NLRB No. 92 (Aug. 29, 1990); *Protection Sprinkler Systems*, 295 NLRB 1072 (1989); *Binney's Casting Co.*, 285 NLRB 1095 (1987).

facility: (1) interrogated employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees; (2) threatened employees with discharge, causing the death of patients, unspecified harm, and other unspecified reprisals for engaging in union activities; and (3) solicited employees to engage in surveillance of other employees' union activities.

About December 12, 1986, the Respondent, acting through Albert Lizzi, at its Old Saybrook facility: (1) informed employees that it would be futile for them to select the Union as their bargaining representative; (2) promised employees a wage increase, increased benefits, and other unspecified improved terms and conditions of employment in order to discourage union activities; (3) threatened employees with the shutdown of its Old Saybrook facility and with causing the death of patients if employees selected the Union as their bargaining representative; and (4) solicited employees to inform the Respondent of their union activities, membership, and sympathies.

About December 16, 1986, the Respondent, acting through its supervisor and agent, Administrator Helena Guerrera, during a telephone conversation, interrogated employees concerning their union activities.

About January 2, 1987, the Respondent, acting through its supervisor and agent, Director of Business Marylee Kimbel, at its Old Saybrook facility, threatened employees with changes in scheduling practices because they engaged in union organizing activities.

About January 13, 1987, the Respondent, acting through Marilyn Raudat, at its Old Saybrook facility: (1) informed employees that it would be futile for them to select the Union as their bargaining representative; (2) threatened employees with discharge if they engaged in union activities; and (3) disparaged the Union.

About February 14, 1987, the Respondent, acting through Marilyn Raudat, at its Old Saybrook facility, threatened employees with discharge for engaging in union activities.

The Respondent, acting through its supervisor and agent, Assistant Director of Nurses Mary Guay, at its Old Saybrook facility: (1) about January 20, 1987, threatened employees with discharge and denial of nurses aide certification for engaging in union activities; (2) about February 13, 1987, engaged in verbal harassment of employees because of their union activities; and (3) about February 18, 1987, threatened an employee with discharge for engaging in union and other protected concerted activities.

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

About December 11, 1986, the Respondent terminated its employee Cheryl S. Motzer. About December 12, 1986, the Respondent converted the termination of Cheryl Motzer, into a written warning.

Since about December 19, 1986, the Respondent has refused to hire employee Jessica Brodeur as a nurses aide. About December 22, 1986, the Respondent constructively discharged Jessica Brodeur from the position of laundry employee.

About December 28, 1986, the Respondent granted wage increases to its nonprofessional employees.

About January 4, 1987, the Respondent granted wage increases to its professional employees.

About January 9, 1987, the Respondent issued a warning letter to its employee Lisa Limeburner.

About February 8, 1987, the Respondent reduced the working hours of Lisa Limeburner.

About February 13, 1987, the Respondent discharged its employee Patricia Raffone.

About February 15, 1987, the Respondent reduced the working hours of employee Marietta Belluci.

By the acts and conduct described above, the Respondent has discriminated and is discriminating in regard to the hire or tenure or terms and conditions of employment of its employees thereby discouraging employees from engaging in union activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. Accordingly, the Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

By promising the employees wage increases, improved working conditions, and increased benefits if they rejected the Union, by informing employees that union representation was futile, by creating an impression among employees that their union activities were under surveillance, by threatening employees with replacement, discharge, denial of nurses aide certification, causing the death of patients, plant closure, and unspecified reprisals, scheduling changes and physical harm if the Union is selected by them as their bargaining representative, by soliciting employees to inform the Respondent about the Union, by soliciting employees

to engage in the surveillance of other employees' union activities, by interrogating employees about union membership activities and sympathies, by verbally harassing employees for their union activities, and disparaging the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. By terminating Cheryl S. Motzer and subsequently converting the termination into a written warning, by refusing to hire Jessica Brodeur as a nurses aide and constructively discharging her from her position as a laundry employee, by granting wage increases to professional and nonprofessional employees, by issuing a warning letter to Lisa Limeburner and reducing her working hours, by discharging Patricia Raffone, and by reducing the working hours of Marietta Belluci, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind its February 1987 changes in employees' Bellucci and Limeburner's working hours and to rescind and remove from its records the written warnings given to Limeburner and employee Motzer.

We shall also order the Respondent to offer employee Raffone immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed.

We shall order the Respondent to offer to employee Brodeur the employment that would have been offered to her but for the unlawful discrimination against her or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniorty or other rights and privileges previously enjoyed.

We shall further order the Respondent to make whole the above-named employees as set forth in the compliance specification with interest to be computed on those amounts as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and state laws.

We shall additionally order the Respondent to remove from its files any reference to the reduction of hours and discharges of these employees and to notify them that this has been done and that evidence of the Respondent's unlawful conduct will not be used as a basis for future personnel actions against them. Finally, as noted above, we shall also remand this case for a hearing on the limited issue of whether a bargaining order is an appropriate remedy under the circumstances of this case.

ORDER

The National Labor Relations Board orders that the Respondent, Al-Charles, Inc. d/b/a Harbor Crossing Skilled Nursing Care Facility, Old Saybrook, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees wage increases, improved working conditions, and increased benefits if they reject New England Health Care Employees Union, District 1199, SEIU, AFL–CIO as their collective-bargaining representative.

(b) Informing employees that it is futile for them to seek union representation.

(c) Creating an impression among its employees that their union activities are under surveillance.

(d) Threatening employees with replacement, discharge, plant closure, and unspecified reprisals if they select the Union as their bargaining representative.

(e) Soliciting employees to inform the Respondent of their union activities, membership, and sympathies.

(f) Interrogating employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(g) Threatening employees with causing the death of patients, unspecified harm, and other unspecified reprisals for engaging in union activities.

(h) Soliciting employees to engage in surveillance of other employees' union activities.

(i) Disparaging the Union.

(j) Threatening employees with discharge for engaging in union activities.

(k) Threatening employees with changes in scheduling practices because they engage in union organizing activities.

(l) Threatening employees with the denial of nurses aid certification for engaging in union activities.

(m) Verbally harassing employees because of their union activities.

(n) Reducing the working hours of employees Belluci and Limeburner in order to discourage their membership in, activities on behalf of, and sympathies for New England Health Care Employees Union, District 1199, SEIU, AFL–CIO or any other labor organization.

(o) Granting wage increases to its professional and nonprofessional employees in order to discourage their membership in, activities on behalf of, and sympathies for New England Health Care Employees Union, District 1199, SEIU, AFL–CIO or any other labor organization.

(p) Discharging, constructively discharging, refusing to employ, or issuing written warnings to employees or otherwise discriminating against them, because of their union membership, activities, and sympathies.

(q) Issuing warning letters to discourage employees from engaging in union activities.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the February 1987 changes in the working hours of employees Belluci and Limeburner and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the compliance specification and the remedy section of this decision.

(b) Offer immediate and full reinstatement to employee Raffone to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the compliance specification and the remedy section of this decision.

(c) Offer to employee Brodeur the employment that would have been offered to her but for the unlawful discrimination against her, or, if that job no longer exists, to a substantially equivalent position, and make her whole for any loss of earnings and other benefits resulting from discrimination against her, with interest.

(d) In regard to the employees Motzer, Limeburner, Brodeur, and Raffone, remove from its files any reference to the unlawful discharges, constructive discharges, and refusal to employ, and notify these employees in writing that this has been done and that the disciplines, discharges, and refusal to employ will not be used as a basis for future personnel actions against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Old Saybrook, Connecticut facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for the purpose of holding a hearing before an administrative law judge on the issue of the alleged 8(a)(1) and (5) violation based on the alleged appropriateness of a bargaining order.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promise employees wage increases, improved working conditions, or increased benefits if they reject New England Health Care Employees Union, District 1199, SEIU, AFL–CIO as their collective-bargaining representative.

WE WILL NOT inform employees that it is futile for them to seek union representation.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten employees with replacement, discharge, plant closure, or unspecified reprisals if they selected the Union as their bargaining representative.

WE WILL NOT question employees about their union activities, membership, or sympathies.

WE WILL NOT interrogate employees regarding their union membership, activities, or sympathies and the union membership, activities, or sympathies of other employees.

WE WILL NOT threaten employees with causing the death of patients, unspecified harm, or other unspecified reprisals for engaging in union activities.

WE WILL NOT solicit employees to engage in surveillance of other employees' union activities.

WE WILL NOT disparage the Union.

WE WILL NOT threaten employees with discharge for engaging in union activities.

WE WILL NOT threaten employees with changes in scheduling because they engage in union organizing activities.

WE WILL NOT threaten employees with the denial of nurses aide certification for engaging in union activities.

WE WILL NOT verbally harass employees because of their union activities.

WE WILL NOT reduce employees working hours in order to discourage their membership in, activities on behalf of, or sympathies for New England Health Care Employees Union, District 1199, SEIU, AFL–CIO or any other labor organization.

WE WILL NOT grant wage increases to professional and nonprofessional employees in order to discourage their membership in, activities on behalf of, or sympathies for New England Health Care Employees Union, District 1199, SEIU, AFL–CIO or any other labor organization.

WE WILL NOT discharge, constructively discharge, refuse to employ, issue written warnings or discriminate against employees in any way, because of their union membership, activities, or sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the February 1987 changes in the working hours of employees Belluci and Limeburner.

WE WILL offer employee Raffone immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from our discrimination against her, less any net interim earnings, plus interest.

WE WILL offer to employee Brodeur the employment that would have been offered to her but for the unlawful discrimination against her, or, if that job no longer exists, to a substantially equivalent position, and make her whole for any loss of earnings and other benefits resulting from discrimination against her, with interest.

WE WILL notify employees Motzer, Limeburner, Brodeur, and Raffone that we have removed from our files any reference to the unlawful disciplines, discharges, and the refusal to employ, and that we will not use the disciplines, discharges, or refusal to employ against them in any way.

AL-CHARLES, INC. D/B/A HARBOR CROSSING SKILLED NURSING CARE FACILITY